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No. _____

In The

Supreme Court of the United States

October Term, 1995

ARCH A. MOORE, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was it error to deny Petitioner's Motion to Vacate Conviction and Sentencing pursuant to 18 U.S.C. § 2255 without conducting an evidentiary hearing?

2. Was it error to deny Petitioner's Motion to Vacate Conviction and Sentencing pursuant to 18 U.S.C. § 2255 without setting forth findings of fact and conclusions of law in keeping with 28 U.S.C. § 2255?

3. Did the District Court erroneously apply the abuse of the writ doctrine in denying Petitioner's Motion to Vacate Conviction and Sentencing pursuant to 18 U.S.C. § 2255?

PARTIES

All parties to the proceedings appear in the caption of this Petition.

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For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Arch A. Moore, Jr., by and through his attorneys, Joel W. Collins, Jr., and Harry W. Moore, Jr., respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit entered in this matter on January 24, 1995.

OPINIONS BELOW

The United States District Court for the Southern District of West Virginia, Charleston Division (hereinafter "the District Court") sentenced Petitioner on July 10,

1990, after denying Petitioner's Motion to Withdraw Guilty Pleas. The Fourth Circuit Court of Appeals Opinion affirming the conviction and sentence was reported at *United States v. Moore*, 931 F.2d 245 (4th Cir. 1991). (App. 3-8.) The Supreme Court Opinion denying Petitioner's Petition for Writ of Certiorari was reported at *Moore v. United States*, ___ U.S. ___, 112 S.Ct. 171, 116 L.Ed.2d 134 (1991). (App. 9.)

Petitioner then filed a Motion to Vacate Conviction and Sentence pursuant to 28 U.S.C. § 2255 (first § 2255 motion) in August of 1991. The District Court denied this motion. The Court of Appeals for the Fourth Circuit (hereinafter the "Fourth Circuit") decision affirming the denial of this Motion was reported at *United States v. Moore*, 993 F.2d 1541 (4th Cir. 1993). (App. 10.) The Supreme Court Opinion denying the Petitioner's subsequent Petition for Writ of Certiorari was reported at *Moore v. United States*, ___ U.S. ___, 114 S.Ct. 391, 126 L.Ed.2d 340 (1993). (App. 11.)

Petitioner filed a second Motion to Vacate Conviction and Sentence pursuant to 28 U.S.C. § 2255, which the District Court denied by Order entered April 25, 1994. (App. 15-25.) Petitioner made a Motion for Reconsideration and for an evidentiary hearing, which the District Court denied by Order entered May 16, 1994. (App. 12-14.)

On June 21, 1994, Petitioner filed his Notice of Appeal appealing from the District Court's Orders entered April 25, 1994 and May 16, 1994. The Fourth Circuit decision affirming the denial of Petitioner's

Motion for Reconsideration and for an evidentiary hearing was an Unpublished Opinion, *United States v. Moore*, 94-6715, decided on January 24, 1995. (App. 1-2.) The Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied on April 6, 1995. (App. 26.)

JURISDICTION

This Court has jurisdiction to review the decree in question by a Writ of Certiorari pursuant to 28 U.S.C. § 2101(c) and Rule 20.1 of the Rules of the Supreme Court.

STATUTES INVOLVED

1. Statutory Provisions:

a. Federal custody: remedies on motion attacking sentence. 28 U.S.C. § 2255. (Pursuant to Supreme Court Rule 14(f), the text of this statute is included in the Appendix.)

STATEMENT OF THE CASE

The Petitioner, Arch A. Moore, Jr., is a former United States congressman and a three (3) term governor of the state of West Virginia. He learned in the fall of 1989 that the United States Department of Justice, United States Attorney's office for the Southern District of West Virginia (hereinafter the "Government") was investigating

his 1984 campaign for the office of governor of West Virginia and his conduct as governor. Petitioner retained in November of 1989 attorney William G. Hundley ("Hundley"), of Washington, D.C., to represent him in this criminal investigation.

On April 11, 1990, the Government delivered to Hundley a proposed Plea Agreement in the case, which Hundley then presented to Petitioner. The proposed plea agreement listed mail fraud (18 U.S.C. § 1341), extortion (18 U.S.C. § 1951), two counts of filing a false tax return (26 U.S.C. § 7206), and obstruction of justice (18 U.S.C. § 1503) to which Moore would agree to plead guilty. The Government informed Hundley that Petitioner had until noon on April 12, 1990 to sign the proposed Plea Agreement or the Government would present a much broader indictment to the grand jury on April 12, 1990. Hundley strongly advised Moore to sign the proposed plea agreement in which Moore would agree to plead guilty to five counts set forth in the agreement. Petitioner protested that he was innocent of Counts 1 through 4, and he lacked knowledge as to what evidence there was to support the charge of Count 5. However, on Hundley's recommendation, Petitioner signed the Plea Agreement on April 12, 1990. An indictment was later returned by the grand jury.

Petitioner was to appear in court on May 8, 1990 to tender his pleas. On May 7, 1990, the Government delivered to Hundley a twenty-six (26) page memorandum it stated it intended to file with the Court. The Government's memorandum contained allegations based on questionable sources and hearsay statements to which

Moore could not agree. These hearsay statements concerned certain acts that Moore had *allegedly* committed and which went well beyond the offenses in the plea agreement and to which he had agreed to plead guilty. After discussing the memorandum, Petitioner asserted his intent that if the Government insisted on filing this memorandum or using its contents in any way at any time, Petitioner would withdraw from the plea agreement and enter pleas of not guilty to all counts.

Hundley discussed the memorandum with attorneys for the Government on the morning of May 8, 1990. As a result of these discussions, the Government represented to Hundley it would not file the memorandum or use its contents in any way and at any time, in direct exchange for the Petitioner's guilty pleas at the hearing later that day. At the hearing, the Government, after the guilty pleas were accepted by the Court, made a short, oral proffer of evidence to establish the factual basis for the Petitioner's pleas.

Before, during, and after the entry of the pleas, Petitioner insisted he was innocent of Counts 1 through 4 of the Indictment. He also stated his uncertainty of his guilt as to Count 5, as he had never seen or heard of the evidence upon which the count was based. Hundley ultimately advised Petitioner to file a Motion to Withdraw his Pleas, and Petitioner did so on June 26, 1990. The District Court ordered the Government to file its response by July 2, 1990, and ordered argument on the motion for July 9, 1990.

On July 5, 1990, four days, including a Saturday and Sunday, before the hearing on the Motion to Withdraw

Guilty Pleas, the Government filed *ex parte* with the District Court and delivered to the sentencing judge a lengthy sentencing memorandum. The Petitioner has never seen this sentencing memorandum, but it is his information and belief it contains substantially all of the information contained in the twenty-six (26) page memorandum the Government had agreed not to file, submit, or use in any way and at any time, this agreement being the direct inducement to the consummation of the plea agreement.

At the hearing on the Motion to Withdraw Guilty Pleas, Hundley discovered that the Government had filed the information of the memorandum in violation of its promise to Petitioner. However, Hundley did not use this violation in support of Petitioner's motion to withdraw guilty pleas; instead, Hundley consented to the entry of an Order withdrawing a memorandum from the record. Hundley did not discuss the basis of this decision with the Petitioner. Therefore, the decision to merely withdraw the sentencing memorandum was effectively a unilateral one on Hundley's part.

At the very end of argument on the Motion to Withdraw Guilty Pleas, the Government, Hundley and the District Court made very obscure references to what we now know was the sentencing memorandum, to wit:

> MR. ELLIS: Your Honor, I have a further matter. For this Motion to Withdraw, I would like to present the Court with the Motion. An order has been signed by both parties.

THE COURT: Is that an endorsed Order?

MR. ELLIS: Yes, it is.

THE COURT: *Is that satisfactory, Mr. Hundley, for me to enter an order withdrawing that from the record?*

MR. HUNDLEY: Yes. And I just want to add this. Mr. Ellis made the representation to me on the phone that it was, you know, withdrawn for good, that it would not be resubmitted tomorrow or et cetera. So that is perfectly satisfactory.

THE COURT: *It will be withdrawn for good as far as I am concerned. If some Appellate Court should call it to my attention, I have a copy and I would answer truthfully under oath or otherwise and produce what was submitted to me* and which you gentlemen have agreed was inadvertently filed. (Emphasis added.)

Unlike the other pleadings submitted in the case, the sentencing memorandum appears on the District Court's docket sheet as simply a "Memorandum" filed and withdrawn. The docket sheet includes no other description of this mysterious Memorandum, although all other docket entries give a detailed description of the pleading filed.

Petitioner filed his first § 2255 Motion in July of 1991. As grounds for this § 2255 Motion, Moore alleged that:

(1) The judgment and conviction and sentence was wrongfully and prejudicially

obtained by the United States in violation of Petitioner's rights under the Fifth Amendment to the Constitution of the United States;

(2) The judgment and conviction was wrongfully and prejudicially obtained by the United States in violation of the Sixth Amendment to the Constitution of the United States;

(3) Petitioner is not guilty of the offenses for which he stands convicted;

(4) The Government could not have proven offenses with which Petitioner was charged if the case had proceeded to trial;

(5) Petitioner would not have plead guilty had he had effective assistance of counsel, and would have insisted on going to trial, or in the alternative, would have been permitted to withdraw his plea of guilty had he had effective assistance of counsel;

(6) Petitioner was, in part, sentenced illegally;

(7) Petitioner was serving a sentence under Count Two of his Indictment pursuant to an offense "that does not exist." *See, McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807, 1814 n.6, 114 L.Ed.2d 307 (1991).

(8) Petitioner was serving a sentence pursuant to Count One which is barred by the statute of limitations and which fails to state an offense pursuant to *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987);

(9) Petitioner was serving a sentence pursuant to Counts Three and Four, which fail to state an offense; and

(10) Petitioner was serving a sentence pursuant to Count Five, which was obtained in violation of Petitioner's rights under the Fifth and Sixth Amendments to the Constitution of the United States.

After filing this § 2255 Motion, Petitioner made a motion for discovery from Hundley in accordance with Rule 6 of the Rules Governing § 2255 Proceedings. Hundley objected. The District Court entered an Order granting Petitioner's motion, but limited discovery to four narrow categories of documents, all of which related to Hundley's representation *prior to* the Petitioner's guilty pleas.

Very little material was produced in response to the District Court's Order, and did not include a sentencing memorandum. The attorney who represented Moore on his first § 2255 Motion, Steven V. Wehner, had no reason to understand that the Government submitted any sentencing memorandum until April 21, 1994, when Petitioner informed Wehner that he thought the Government may have filed the twenty-six page memorandum in violation of its express representation made on May 8, 1990. (App. 29-30.)

The central issue raised by the Petitioner's first § 2255 Motion was whether Hundley gave him effective assistance of counsel. Initially, Hundley offered to cooperate fully with Moore and his new attorney in developing the facts regarding Hundley's representation of Petitioner in the criminal case for the purpose of Petitioner's first § 2255 Motion. However, Hundley later

became a Government witness in the proceedings on the first § 2255 Motion. Hundley never told Petitioner or his attorney that the Government filed a memorandum in violation of its promise to Petitioner. Hundley never mentioned a sentencing memorandum. Neither Petitioner nor attorney Wehner have ever seen this memorandum.

The District Court denied Petitioner's first § 2255 Motion. Petitioner, proceeding *pro se,* filed a second § 2255 Motion in November 1993. Petitioner's second § 2255 Motion alleges:

(1) The Court should vacate his conviction on Count One of the Indictment, because the statute of limitations bars it as an offense. The material supporting this position had just been made available to him by the Government who has exclusive possession of all documents Petitioner needed to support his motion.

(2) The Court should vacate his conviction on Counts Three and Four, charging filing false tax returns in violations in violation of 26 U.S.C. § 1706(1), because campaign contributions were not extorted in violation of 18 U.S.C. § 1951 and were not taxable income.

(3) The Court should vacate his conviction on Count Two, charging a violation of 18 U.S.C. § 1951 (Hobbs Act), because Petitioner did not plead guilty to the essential elements of a Hobbs Act violation as they were refined by *Evans v. United States,* ___ U.S. ___, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992).

(4) The Court should vacate his conviction, in its entirety, because the Government violated the Plea Agreement in submitting the sentencing memorandum. (In support of this ground, Moore relies upon the holding of *Santobello v. New York*, 404 U.S. at 263.)

(5) The Court should correct Petitioner's fines because:

(a) the fines imposed on Counts One and Two exceed any applicable statutory authority; and

(b) the $50,000.00 fine on Count Five exceeded the amount authorized by the United States Guidelines.

In its Response to Moore's second § 2255 Motion, the Government argued that the District Court should deny the Motion, without an evidentiary hearing, under the abuse of the writ doctrine.

On April 18, 1994, the District Court heard arguments from Petitioner and the Government on the narrow issue of whether Petitioner's second § 2255 Motion should be dismissed under the abuse of the writ doctrine. The District Court, *without holding any evidentiary hearing*, denied Petitioner's second § 2255 Motion on the grounds that it violated the abuse of the writ doctrine. (App. 15-25.) Petitioner filed a Motion for Reconsideration and an evidentiary hearing with the District Court. This motion was denied, and an Order denying such was entered on May 16, 1994. (App. 12-14.)

Petitioner filed his Notice of Appeal to the United States Court of Appeals for the Fourth Circuit on June 21, 1994. On January 24, 1995, the Fourth Circuit issued its

unpublished opinion affirming the District Court's denial of Petitioner's § 2255 Motion and his motion for reconsideration thereof. (App. 1-2.)

After the panel decision, Petitioner requested a rehearing *en banc*. The request was denied on April 6, 1995. (App. 26.)

Petitioner seeks the review of the decision of the Court of Appeals on the issues of whether the District Court erred in denying Petitioner's second § 2255 Motion without an evidentiary hearing to ascertain the true facts supporting said § 2255 Motion and without stating its findings of fact and conclusions of law, both of which are required by 18 U.S.C. § 2255. Petitioner also seeks review of the District Court's apparent conclusion as a matter of law that the abuse of the writ doctrine barred the Petitioner from proceeding on the *Santobello* grounds alleged in his second § 2255 Motion, even though the Petitioner, after due diligence, did not discover the violation of his plea agreement until considerable time after the Court disposed of his first § 2255 Motion.

REASONS FOR GRANTING THE WRIT

1. REVIEW WILL RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Fourth Circuit's Affirming of the District Court's Denial of an Evidentiary Hearing with Respect to Petitioner's Second § 2255 Motion is in Conflict with the Statute and the Decisions of other United States Courts of Appeal.

Petitioner alleged as the fourth grounds in his second § 2255 Motion a *Santobello* violation by the Government. The District Court erred in denying Petitioner's second Motion to Vacate Conviction and Sentence without conducting an evidentiary hearing because 28 U.S.C. § 2255 requires such a hearing. 28 U.S.C. § 2255 states, in pertinent part:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, *grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.* (Emphasis added.)

The Court of Appeals for the Fifth Circuit, in keeping with the clear mandate of the statute, has held that if the allegations in a § 2255 Motion are not negated by the record, " . . . the District Court must hold an evidentiary hearing to 'decide all of these unresolved factual allegations, which, if true, might support (the) constitutional claim.' " *United States v. Briggs*, 939 F.2d 222, 228 (5th Cir. 1991) (parenthetical added). An evidentiary hearing is

required in cases where the Petitioner has alleged facts supporting a *Santobello* claim. Thus, an evidentiary hearing is warranted:

> When a petitioner's habeas claim is based on an unkept promise in a plea agreement, and his petition contains 'specific factual allegations not directly contradicted by the record, of circumstances undermining his plea' . . .
>
> *United States v. Birdwell*, 887 F.2d 643, 645 (5th Cir. 1989).

Relatedly, the District Court made no findings of fact and conclusions of law on the *Santobello* grounds alleged in Petitioner's § 2255 Motion. 28 U.S.C. § 2255 specifically requires the District Court to make findings of fact and conclusions of law, as do Rule 12 of the Rules Governing § 2255 Proceedings and Rule 52 of the Federal Rules of Civil Procedure.

Under the statute and the rules applicable thereto, it was error for the District Court to deny Petitioner's second § 2255 Motion without an evidentiary hearing and without stating findings of fact and conclusions of law.

2. REVIEW WILL RESOLVE A DECISION WHICH IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. The District Court Erred in its Application of the Abuse of the Writ Doctrine.

The District Court erred in denying Petitioner's second Motion to Vacate Conviction and Sentence without conducting an evidentiary hearing because Petitioner

presented substantial evidence that he was entitled to an evidentiary hearing on his *Santobello* grounds.

The abuse of the writ doctrine requires the Government to plead with clarity and particularity the Petitioner's prior writ history, and allege and identify those claims which it believes abused the writ. *McCleskey v. Zant*, 499 U.S. 467, 494, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991). The burden then shifts to the Petitioner to show cause for failure to present the claim in a previous petition and the prejudice caused by the claimed error.

When the Government pleads abuse of the writ, the District Court should hold an evidentiary hearing to determine cause and prejudice, unless it "determines as a matter of law that Petitioner cannot satisfy the standard." *McCleskey*, 499 U.S. at 494, 111 S.Ct. at 1470. On the facts presented by Petitioner, the District Court could not have properly concluded, as a matter of law, that Petitioner could not satisfy the cause and prejudice standard.

In determining cause under the abuse of the writ doctrine, the District Court is to use the following standard:

> The question is whether Petitioner possessed, or by reasonable means, could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process.
>
> *McCleskey*, 499 U.S. at 498, 111 S.Ct. at 1472.

Further, a finding of cause "requires a showing of some external impediment preventing counsel from constructing or raising a claim." *McCleskey*, 499 U.S. at 497,

111 S.Ct. at 1472, *quoting, Murray v. Carrier*, 477 U.S. 478, 492, 106 S.Ct. 2639, 2648, 91 L.Ed.2d 397 (1986).

Cause has been held to include interference by government officials which makes presentation of the new grounds in the prior petition impracticable. *See Carrier*, 477 U.S. at 488, 106 S.Ct. at 2645. Cause has also been held to include a showing that the factual or legal basis for a claim was not reasonably available when the prior petition was made. *McCleskey*, 499 U.S. at 494, 111 S.Ct. at 1470. Finally, ineffective assistance of prior counsel can satisfy the cause requirement of the abuse of the writ doctrine. *McCleskey*, 499 U.S. at 494, 111 S.Ct. at 1470. Petitioner submits that all three of these causes are present in this case.

In the pleadings filed as part of the proceedings on Petitioner's Second § 2255 Motion, Petitioner submitted to the District Court substantial evidence that he could establish cause for failing to raise his *Santobello* grounds in his first § 2255 Motion. Petitioner also submitted to the District Court substantial evidence that he would suffer prejudice if the District Court did not allow him to proceed with his second § 2255 Motion on the *Santobello* grounds.

Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971) states that:

> . . . [W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

The standard set by *Santobello* obviously applies to deliberate breaches of a plea agreement, but it also

applies when the government inadvertently breaches a plea agreement. *Santobello*, 404 U.S. at 262, 92 S.Ct. at 499.

If the government violates the terms of the plea agreement, the Court must vacate the sentence and allow the defendant to withdraw his plea or seek specific performance of the plea agreement. *Santobello*, 404 U.S. at 263, 92 S.Ct. at 499. The Court must allow the defendant an opportunity to seek relief even if the sentencing court states that the government's violation of the plea agreement did not influence its sentence. *Santobello*, 404 U.S. at 263, 92 S.Ct. at 499; *See also United States v. Crusco*, 536 F.2d 21, 26 (3d Cir. 1976).

Petitioner presented to the District Court evidence that the government violated its plea agreement with him under *Santobello*, and that he neither possessed, nor could have obtained by reasonable investigation, evidence of the *Santobello* violation until after his first § 2255 Motion had been denied.

Petitioner presented evidence that the Government, on the day before the scheduled arraignment, submitted to Hundley the twenty-six (26) page Memorandum the Government stated it intended to submit to the Court. After review and discussion, Hundley and Petitioner expressed in no uncertain terms that if the Government used the contents of the memorandum in any way at any time, Petitioner would plead not guilty to the charges. The Government represented to Petitioner and Hundley it would not file, submit, or otherwise use the contents of the memorandum in any way and at any time. It was only with this representation that Petitioner agreed to plead guilty.

The Court of Appeals for the Fourth Circuit found that the Government's promise not to use the allegations of the twenty-six (26) page memorandum was the inducement for the Petitioner's guilty plea. In the Opinion deciding Petitioner's direct appeal, the Fourth Circuit stated:

> On the eve of his pleas, the government tendered to his attorney a 26 page memorandum that it intended to submit to the court in support of the guilty pleas. Defense counsel informed the government that the defendant would not agree to the factual proffer contained in the document and that, if the government insisted on filing it, there would be no guilty plea. The government agreed not to file the memo and presented a short oral proffer instead.
>
> *United States v. Moore*, 931 F.2d 245, 247 (4th Cir. 1991). (App. 3-8.)

The Government breached the plea agreement when it filed and mailed to the sentencing judge a sentencing memorandum that incorporated substantially all of the contents of the twenty-six (26) page memorandum which the Government had agreed to not file, submit, or otherwise use in inducing Petitioner's pleas. Further, the fact that the filed sentencing memorandum was withdrawn does not cure the *Santobello* violation. The breach of the Government's promise by filing the sentencing memorandum completed the *Santobello* violation. Petitioner submits that an evidentiary hearing by the District Court on this matter would have led it to these conclusions.

Petitioner also presented substantial evidence of cause for his failure to allege the *Santobello* violation in

his first § 2255 Motion. First, neither Petitioner nor Attorney Wehner knew that any sentencing memorandum was filed and mailed to the sentencing judge until after the denial of Petitioner's first § 2255 Motion. Further, a review of the transcripts of the hearing on Petitioner's Motion to Withdraw Guilty Pleas and Petitioner's sentencing hearing would not have reasonably alerted either Petitioner or Attorney Wehner to the sentencing memorandum, as only obscure references to a filing of an unidentified memorandum were made during those hearings. Similarly, a review of the District Court's docket sheet would not have alerted Petitioner or Attorney Wehner to the filing of the sentencing memorandum, as the docket sheet makes only a general reference to a "memorandum" filed and withdrawn.

Attempts to secure from Hundley information about the sentencing memorandum proved unfruitful, as Hundley became a witness for the Government and against his own client. Formal discovery did not uncover the sentencing memorandum, because the District Court's Order granting Petitioner discovery from Hundley limited that discovery to documents that related to Hundley's representation prior to Petitioner's guilty pleas.

In light of the evidence of cause and prejudice presented by the Petitioner, the District Court erred in denying Petitioner's second § 2255 Motion without an evidentiary hearing. Unless the District Court properly concludes, as a matter of law, that the Petitioner cannot establish cause and prejudice under the abuse of the writ doctrine, the District Court must hold an evidentiary hearing.

CONCLUSION

Petitioner prays for a writ of certiorari to review the denial of his Motion to Vacate Sentence and Conviction pursuant to 28 U.S.C. § 2255 to the United States District Court for the Southern District of West Virginia, Charleston Division, because the District Court erred in denying said motion without an evidentiary hearing in light of the evidence of cause and prejudice to the Petitioner, and without stating findings of fact and conclusions of law. For these reasons, this Petition for Writ of Certiorari should be granted.

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June 30, 1995

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-6715

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

versus

ARCH A. MOORE, JR.,

Defendant – Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Richard L. Williams, Senior District Judge, sitting by designation. (CR-90-78, CA-93-1015)

Submitted: December 20, 1994

Decided: January 24, 1995

Before HALL and MURNAGHAN, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Joel Wyman Collins, Jr., COLLINS & LACY, Columbia, South Carolina; Harry Warner Moore, Jr., Moundsville,

West Virginia, for Appellant. Larry Robert Ellis, Assistant United States Attorney, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Appellant appeals from the district court's order denying his 28 U.S.C. § 2255 (1988) motion and his motion for reconsideration pursuant to Fed. R. Civ. P. 60(b). Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. *United States v. Moore*, No. CR-90-78 (S.D.W. Va. April 25, May 16, 1994). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES of America,
Plaintiff-Appellee,

v.

Arch A. MOORE, Jr.,
Defendant-Appellant.

No. 90-5819.

United States Court of Appeals,
Fourth Circuit.

Argued Feb. 7, 1991.

Decided April 23, 1991.

Defendant pleaded guilty in the United States District Court for the Southern District of West Virginia, Walter E. Hoffman, Senior District Judge. Defendant appealed. The Court of Appeals, Murnaghan, Circuit Judge, held that: (1) defendant was not entitled to hearing to testify on motion to withdraw pleas; (2) Government's agreement not to file detailed written statement of facts with court was not material and did not need to be disclosed to court at time of guilty plea; and (3) prosecutor's remarks calculated to induce court to issue severe prison term did not violate prosecutor's promise in plea agreement to refrain from recommending specific sentence.

Affirmed.

William George Hundley, argued (Larry S. Gondelman, Richard N. Wiedis, on brief), Akin, Gump, Strauss, Hauer & Feld, Washington, D.C., for defendant-appellant.

John M. Campbell, Public Integrity Section, U.S. Dept. of Justice, Washington, D.C., argued (Michael W. Carey, U.S. Atty., Joseph F. Savage, Jr., Larry R. Ellis, Asst.

U.S. Attys., Charleston, W.Va., on brief), for plaintiff-appellee.

Before RUSSELL, PHILLIPS, and MURNAGHAN, Circuit Judges.

MURNAGHAN, Circuit Judge:

The defendant, former West Virginia Governor Arch A. Moore, Jr., signed a plea agreement with the government on April 12, 1990, in which he agreed to plead guilty to a five count indictment. However, he did not appear in court to enter his pleas of guilty until May 8, 1990. On the eve of his pleas, the government tendered to his attorney a twenty-six page memorandum that it intended to submit to the court in support of the guilty pleas. Defense counsel informed the government that the defendant would not agree to the factual proffer contained in the document and that, if the government insisted on filing it, there would be no guilty plea. The government agreed not to file the memo and presented a short oral proffer instead. The plea proceedings were held on May 8 and the court accepted the guilty pleas. Sentencing was set for July 10, 1990.

On June 19, 1990, the defendant's attorney wrote to the court that he intended to file a Motion to Withdraw Guilty Pleas. Such a motion was filed on June 28, 1990. As part of the motion, the defendant's attorney presented an affidavit of himself. The court then ordered the government to file its response by July 2, 1990, and ordered argument on the motion for July 9, 1990.

On July 9, a hearing was held. Defense counsel proffered an additional affidavit of himself, and asked for an

evidentiary hearing at which he proposed to call the defendant to testify as to the basis for his motion to withdraw. The government opposed the request for an evidentiary hearing. The court held that the defendant had not met his burden of presenting a "fair and just reason" for the motion and refused to allow him to testify.

As a result, sentencing proceeded the following day. After hearing presentations by both sides, including a strongly worded plea by the government that the court make an example of the defendant, the court sentenced the defendant to the following: six months on count one, five years on count two, two years on count three, two years on count four, and ten months on count five. The sentences on counts one, two, three, and four were to run concurrently with each other. The sentence on count five (the only one subject to the Sentencing Guidelines) was to run consecutively with the sentence on the other four counts. The court also stated that the defendant was immediately eligible for parole on counts one through four. Finally, the court imposed fines totaling $170,000.00 and a special assessment in the amount of $250.00.

On July 18, 1990, the defendant filed a Notice of Appeal. The notice was amended on July 20, 1990 to correct an error in the original notice. The defendant then filed a Motion for Bail Pending appeal, which was denied. A Motion for Bail Pending Appeal was subsequently filed in this court and was again denied on August 6, 1990. Pursuant to the order of the district court, the defendant self-surrendered to the federal prison camp at Maxwell Air Force Base.

I.

Defendant has argued that the district court erred in denying his request for an evidentiary hearing on his motion to withdraw his guilty pleas. Specifically, he contends that he should have been allowed to take the stand himself, as the sole witness at such a hearing. The assertion would appear to be that, had the court granted him the opportunity to testify, his testimony might have carried the day, persuading the court to permit him to withdraw his pleas.

To this day, however, neither the government nor the district court – nor this court – has any idea what it is that defendant would have said from the stand. Moore neither filed his own affidavit nor proffered what his testimony would have been. He never has said how it would have differed from his counsel's affidavits, or how it would have altered the district court's ruling. Repeatedly during oral argument on the motion, defense counsel deflected questions from the court about the grounds for the motion, insisting that the court should allow the defendant to answer the questions himself from the witness stand. Counsel never said what defendant's answers would be or what they would prove. He never disavowed his own affidavit testimony.

Under Fed.R.Crim.P. 32(d), a defendant does not have an absolute right to withdraw a guilty plea, even before sentencing. *United States v. Rios-Ortiz*, 830 F.2d 1067 (9th Cir.1987). Rather, a defendant bears the burden of demonstrating to the district court's satisfaction that a "fair and just reason" supports his request to withdraw. Fed.R.Crim.P. 32(d); *United States v. DeFreitas*, 865 F.2d 80,

82 (4th Cir.1989); *United States v. Haley*, 784 F.2d 1218, 1219 (4th Cir.1986). The determination is entrusted to the discretion of the district court.

Nor does a defendant automatically get an evidentiary hearing as a matter of right whenever he seeks to withdraw his guilty plea. *United States v. Thompson*, 680 F.2d 1145, 1151-52 (7th Cir.1982), *cert. denied*, 459 U.S. 1089, 103 S.Ct. 573, 74 L.Ed.2d 934 (1982). Nevertheless, it is well settled that "evidentiary hearings should be liberally granted prior to sentencing." *United States v. Fountain*, 777 F.2d 351, 358 (7th Cir.1985); *see also, e.g., United States v. Russell*, 686 F.2d 35, 38 (D.C.Cir.1982). Still, that hearing need only be granted "when a 'fair and just reason' for withdrawal of the plea is presented." *Fountain*, 777 F.2d at 358, *quoting Thompson*, 680 F.2d at 1152. No such showing has been made here, and the denial of Moore's request for a hearing was within the district court's discretion.

Courts typically consider a variety of factors in determining whether a defendant has met his burden under Rule 32(d). The factors include (1) whether the defendant has offered credible evidence that his plea was not knowing or not voluntary, (2) whether the defendant has credibly asserted his legal innocence, (3) whether there has been a delay between the entering of the plea and the filing of the motion, (4) whether defendant has had close assistance of competent counsel, (5) whether withdrawal will cause prejudice to the government, and (6) whether it will inconvenience the court and waste judicial resources. *See, e.g., United States v. Hurtado*, 846 F.2d 995, 997 (5th Cir.), *cert. denied*, 488 U.S. 863, 109 S.Ct. 163, 102 L.Ed.2d 133 (1988); *United States v. Carr*, 740 F.2d 339, 343-44 (5th

Cir.1984), *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985); *United States v. Kobrosky*, 711 F.2d 449, 455-56 (1st Cir.1983).

None of the above mentioned six factors seems dispositively to favor defendant here. First and most importantly, Moore, a lawyer and former governor assisted by competent counsel, was simply not convincing in claiming that the Rule 11 plea was not knowing and voluntary.

Second, the defendant never made credible assertions of his innocence. Rather, he took issue with some of the details of the government's version of events and their characterization; for example, he seeks to make something of fact that what was called in the version "extortion" was in fact a "bribe."

Third, Moore long delayed between the time of the pleas and the time of entering the motion to withdraw guilty pleas. He waited six weeks before giving notice of his intent to move to withdraw his pleas.

The fourth factor, inadequacy of aid of counsel, is not persuasive. Competency of counsel is not questioned. As to the fifth factor, although the government does claim prejudice, the U.S. Attorney has not made a particularly strong showing in that respect. Despite the weakness in the government's presentation on the issue, these factors are only balancing considerations, and so the lack of prejudice to the government, in and of itself, is not dispositive.

Finally, a reopening of the plea would have been futile. There was no substance to Moore's claims. It would be pointless, perhaps even unjust, to allow him to

relitigate. Despite the policy in favor of liberally granting evidentiary hearings prior to sentencing, Moore has not presented a "fair and just reason" for the withdrawal of his plea. It was, thus, no abuse of discretion for the district court, in the circumstances, to deny him the hearing.

II.

Rule 11(e)(2) requires "disclosure of the [plea] agreement" to the district court at the time a guilty plea is taken. The Rule is properly read to mean that all "material terms" (or material "details" or "elements") of the agreement must be disclosed. *United States v. Daniels*, 821 F.2d 76, 79 (1st Cir.1987); *United States v. Blackner*, 721 F.2d 703, 708 (10th Cir.1983); *United States v. Roberts*, 570 F.2d 999, 1005, 1007 (D.C.Cir.1977). The purpose of the requirement is to enable the district court to probe the defendant's understanding of the consequences of his bargain, and the voluntariness of his entering it. *Daniels*, 821 F.2d at 80.

Rule 11(f) places a heavy burden on the court to insure that there is a basis for the plea. The rule states that

> [n]otwithstanding the acceptance of the plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

The district court's inquiry into the factual basis of a plea must be searching and not merely *pro forma*.

Moore has contended that the parties failed to disclose to the district court one of the material terms of his plea agreement. The undisclosed term was supposedly comprised of the government's last-minute concession, on the morning that Moore entered his guilty pleas, that it would not file a detailed written statement of facts with the court, but would instead make a more limited oral proffer of the pleas' factual basis. From that flows the argument that abandonment by the government on May 8, 1990 of its plan to file the written statement was actually a material term of his April 12, 1990 plea agreement. Moore has further sought to contend that the parties' failure to inform the district court of the decision to file the written statement undercut the Fed.R.Crim.P. 11 proceedings and invalidated his pleas.

Responding, the government has asserted that the reason it never occurred to anyone to tell the district judge about the written statement is that it was irrelevant to Moore's underlying agreement to plead guilty. Rule 11 requires disclosure of only the material elements of the plea agreement.

Here, the terms of the plea agreement are set out in the document signed by the parties on April 12. The agreement recites the terms and conditions contemplated by Rule 11 – that the defendant had received no promises about his likely sentence, and that the government would recommend no specific sentence, although it reserved the right to allocute at sentencing; and that the government would bring no other charges against the defendant. The statement further recited that "[t]his written agreement constitutes the entire agreement between the United States and Mr. Moore in this matter." There is nothing in

the agreement that would indicate anything with even the hint of unconscionability. It is reasonable that Moore was required to abide by his word. The attempt of the parties to work out a detail as to how the government would state the factual basis of its case (no error having been called to the court's attention) had little to do with the plea agreement, or the concerns underlying Rule 11.

On May 8, 1990, just before the proceeding in which Moore entered his pleas, the government acquiesced in the defense counsel's demand that the government proffer its factual basis in a more limited version than it had proposed filing. That did not materially concern the government's position at sentencing, the voluntariness of the defendant's decision to plead guilty, or the existing plea agreement. It did not affect the court's obligation under Rule 11, it had little effect on the factual basis for the plea, and it did not change the fact that defendant was truthfully admitting his guilt. It was the working out of an objection from defense counsel, not over whether the defendant was willing to admit his guilt to the crimes charged, but over how much of the government's evidence he was willing to acknowledge publicly to be true, and in what detail.

At oral argument on the motion to withdraw the pleas, the district judge said that knowledge of the discussions would have caused him to do nothing differently. He concluded that the question of how the government would present the factual basis for defendant's pleas was not a material part of the plea agreement, and that the parties' not telling him about it did not violate Rule 11. That finding is not clearly erroneous.

III.

It is settled law that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). When the government fails to adhere to the plea agreement in any way, the sentence must be vacated and remanded to the district court either to allow the appellant to withdraw his plea or grant specific performance of the plea agreement. *Id.* at 263, 92 S.Ct. at 499. That is the case even if the judge assures that he was not influenced in his sentencing by the prosecutor's recommendation. *United States v. Crusco*, 536 F.2d 21, 26 (3rd Cir.1976). Moore has sought to establish that there was departure by the government from the terms of the plea agreement.

It is settled that the defendant is entitled "to the enforcement of the agreement which he entered into with the government and which was the inducement to his guilty plea." *United States v. Reckmeyer*, 786 F.2d 1216, 1223 (4th Cir.), *cert. denied*, 479 U.S. 850, 107 S.Ct. 177, 93 L.Ed.2d 113 (1986). *See also Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971).

Paragraph 9 of the plea agreement provided, in pertinent part:

> It is understood that the matter of sentencing is within the sole discretion of the Court and the United States will make no recommendation as to a specific sentence. However, the United States retains the right to inform the probation office and the Court of any relevant facts, to

> address the Court with respect to the nature and seriousness of the offense, to respond to any questions raised by the Court, to correct any inaccuracies or inadequacies in the presentence report and to respond to any statements made to the Court by or on behalf of Mr. Moore.

Nevertheless, Moore has claimed that the "spirit" of the plea agreement was violated because the United States sought a "severe prison term" and made " 'a transparent effort to influence the severity' of Moore's sentence." The plea agreement, however, did not restrict the prosecutors as he suggests and, given the sophistication of both defendant and counsel, the argument of plea agreement violation is without merit.

Defense counsel has made the argument that the "spirit" of the deal was violated. In the case of an unsophisticated or underrepresented defendant, we might be inclined to take a less literal view of the terms of the plea agreement, but there is no adequate reason why Moore, represented by very able counsel, should not be held to his word. Governor Moore did not have a reasonable basis to believe that the prosecutor's promise to refrain from recommending a *specific* sentence protected him from remarks calculated to induce the Court to issue a *severe* prison term.

The judgment, accordingly, is

AFFIRMED.

Arch A. MOORE, Jr., petitioner v.
UNITED STATES. No. 91-27.

Case below, 931 F.2d 245.

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Oct. 7, 1991. Denied.

DECISIONS WITHOUT PUBLISHED OPINIONS

Title	Docket Number	Date	Disposition	Appeal from and Citation (if reported)
U.S. v. Moore	92-6419	5/26/93	AFFIRMED	S.D.W.Va.
	*	*	*	

Arch A. MOORE, Jr., petitioner,
v. UNITED STATES.

No. 93-504.

Nov. 1, 1993.

Case below, 931 F.2d 245; 993 F.2d 1541.

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
Charleston Division

ARCH A. MOORE, JR.

Movant,

v.

UNITED STATES OF AMERICA

Criminal No. 2:90-00078

(Civil Action No. 2:93-0709)

_____ /

ORDER

In accordance with the accompanying memorandum it is ORDERED that petitioner's motion for reconsideration and motion for an evidentiary hearing are DENIED.

Petitioner is ADVISED that he may appeal the decision of this Court. Should he wish to do so, written notice of appeal must be filed with the Clerk of the Court within thirty (30) days of the date of entry hereof.

Let the Clerk of the Court SEND a copy of the Order and of the accompanying Memorandum to the petitioner and counsel for the respondents.

And it is so ORDERED.

/s/ Richard C. Williams
UNITED STATES
DISTRICT JUDGE

Dated: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
Charleston Division

ARCH A. MOORE, JR.

Movant,

v.

UNITED STATES OF AMERICA

Criminal No. 2:90-00078
(Civil Action No. 2:93-0709)

_____ /

MEMORANDUM

By Order entered April 25, 1994, the Court denied Mr. Moore's petition for relief pursuant to 28 U.S.C. § 2255. On May 9, 1994, Mr. Moore filed a "motion for reconsideration and motion for evidentiary hearing."

Relief from a judgment or order may be granted pursuant to Rule 60(b) on the basis of mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, or any other reason justifying relief from the operation of the judgment. Fed. R. Civ. P. 60(b). In support of his motions Mr. Moore asserts essentially the same arguments he raised in his pleadings in his habeas action. Where a Rule 60(b) motion is nothing more than a request that the district court change its mind, it is not authorized by Rule 60(b). *United States v. Williams*, 674 F.2d 310, 312 (4th Cir. 1982). Accordingly, petitioner's motion to reconsider the Order entered April 25, 1994, will be DENIED.

Mr. Moore's motion for an evidentiary hearing will be DENIED for the reasons stated in the Memorandum Opinion entered April 25, 1994.

An appropriate order shall issue.

/s/ Richard C. Williams
UNITED STATES
DISTRICT JUDGE

Dated: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
Charleston Division

ARCH A. MOORE, JR.

Movant,

v.

UNITED STATES OF AMERICA

Criminal No. 2:90-00078
(Civil Action No. 2:93-0709)

_____ /

MEMORANDUM OPINION

This matter is before the Court on defendant Arch A. Moore's petition, pursuant to 28 U.S.C. § 2255, to correct the sentences of fines imposed upon him by the Court. Initially, defendant asserts that fines levied as to Counts One, Two, and Five are illegal. Moore has also moved to amend his petition to vacate his conviction on Counts One through Four and to be allowed to withdraw his guilty plea. Moore's motion to amend his petition is granted.

I. Facts

Moore filed his first petition for relief pursuant to 28 U.S.C. § 2255 on August 1, 1991. In his first petition Moore asserted the following grounds for relief,

> A. Moore's Entire Conviction and Sentence Must Be Vacated Because He Would Never Have Pled Guilty and Would Have Insisted Upon Going to Trial If He Had Been Properly Advised

By His Counsel About His Sentence, Parole Eligibility and Consequences of Pleading Guilty.

B. Moore's Entire Conviction and Sentence Must Be Set Aside Because His Plea Was Not Made Voluntarily and Intelligently.

C. Moore's Entire Conviction Must Be Vacated Because His Counsel Failed To Investigate Adequately the Charges Against Him and Take the Time Needed to Analyze the Evidence and Available Defenses and With Particular Regard to Counts One, Three, and Four, Count One Is Barred By the Statute of Limitations, and Counts Three and Four Do Not Constitute an Offense Because the Dollars Charged Were Not Income To Moore.

D. Moore's Conviction and Sentence Must Be Vacated Because the Government Intentionally Violated Moore's Fifth and Sixth Amendment Rights to Counsel.

E. Moore's Conviction and Sentence as to Count Two of the Indictment Must Be Dismissed Because the Hobbs Act Is Inapplicable to the Extortion Charges Brought Against Moore.

Moore, Civil No. 2:91-0797, Memorandum of Law In Support of A. Moore's Motion to Vacate Conviction and Sentence, Table of Contents.

The district court held an evidentiary hearing on January 7, 1992. On February 12, 1992, the district court denied Moore's petition concluding that Moore had failed to prove that Hundley's services fell below an objective standard of reasonableness and that he would not have pled guilty but for Hundley's advice. The Court found no merit to petitioner's challenges to the legal sufficiency of

each count of the indictment. Moore appealed the denial of his Section 2255 petition and lost. *United States v. Moore,* 931 F.2d 245 (4th Cir.), *cert. denied,* 112 S.Ct. 171 (1991), *denial of Habeas Corpus aff'd,* 993 F.2d 1541 (4th Cir.), *cert. denied,* 114 S. Ct. 391 (1993).

II. Analysis

A. Moore's Argument

Moore's present claims may be fairly summarized as follows:

1. The Court should vacate Count One of the indictment because the statute of limitations bars it as an offense.

2. Counts Three and Four involve filing false tax returns. Moore moves the Court to dismiss counts Three and Four because he did not extort certain campaign contributions, therefore pursuant to *McCormick v. United States* they did not amount to taxable income.

3. The Court should dismiss Count Two of the indictment because *U.S. v. Evans* refined the elements necessary for a conviction under the Hobbs Act. Petitioner did not plead guilty to acts sufficient to give rise to a conviction under the revised interpretation of the Hobbs Act.

4. The Court should allow petitioner to withdraw his guilty plea since the prosecution acted inappropriately and violated the plea agreement.

5. The Court should correct petitioner's fines because,

a. the fines imposed on Counts One and Two exceeded any applicable statutory authority and,

b. the $50,000 fine on Count Five exceeded the sentencing guidelines.

B. The Government's Procedural Argument

The Government responds to petitioner's argument in two ways. First, the government asserts that Moore's motion should be dismissed without consideration of the merits because the petition is abusive and successive and Moore procedurally defaulted any claim relating to the amount of his fines. Additionally, the government maintains that the fines on counts One and Two were properly imposed.

A second petition for relief pursuant to 28 U.S.C. § 2255 may be dismissed,

> . . . if the judge finds it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the procedure governed by these rules.

Rule 9(b), Rules Governing 28 U.S.C. § 2255 Proceedings.

Successive Claims

The Supreme Court has held that claims raised in a subsequent petition may be dismissed as successive if three criteria are met: new petition alleges the (1) same grounds for relief, (2) the prior adjudication was on the

merits, and (3) the petitioner can not show, "the ends of justice" would be met by redetermining the issue. *Sanders v. United States,* 373 U.S. 1, 15-17 (1963). Courts grant a broad meaning to the "same ground" test. *Id.* at 16; *Miller v. Bordenkircher,* 764 F.2d 245, 250 (4th Cir. 1985).

Petitioner's first claim raises the same statute of limitations question addressed and dismissed by the Court in his prior Section 2255 motion. *Moore,* Civil No. 2:91-0797, Finding of Fact and Conclusions of Law, p. 22-26. In his second claim Moore asserts the Court should vacate his sentence on Counts Three and Four for same arguments he raised in his initial Section 2255 petition. See, *supra* claim C. Moore alleges that he has new facts regarding the government's potential witnesses which indicate the money received by him was actually a campaign contribution. The same or identical grounds may exist though proved by different facts and different legal arguments, or even if presented in different language. *Sanders,* 373 U.S. at 16; *Miller,* 764 F.2d at 250. Petitioner's first and second claims are successive since they are based on the same grounds for relief that the court dismissed on the merits in the prior Section 2255 petition.

Abusive Claims

When a movant petitions for relief pursuant to 28 U.S.C. § 2255, he must raise all available claims challenging his conviction and sentence. *McCleskey v. Zant,* 499 U.S. 467, 494 (1991)[1]. Abuse of the writ occurs when a

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[1] Although *McCleskey* involved abuse of the writ in the context of a petition pursuant to 28 U.S.C. 2254, the underlying rationale was based on ensuring finality in habeas litigation

movant raises in a subsequent § 2255 motion a claim that he could have raised in his first motion. *Id.* at 492. Moore's third, fourth and fifth claims are all new claims. In order to avoid dismissal of these claims for abuse of the writ, Moore must show "cause" for his failure to raise the claim in his previous petition and "actual prejudice" resulting from the complained of error. *Id.* at 491.

The Court may not address the merits of the petition if it is premised on claims that constitute an inexcusable abuse of the writ. *McCleskey,* 499 U.S. at 467; *Sawyer v. Whitley,* 120 L. Ed.2d 269, 279 (1992). The preliminary question is whether Moore had cause for failing to raise his current challenges to his conviction and sentence in his first Section 2255 petition. The *McCleskey* Court addressed the cause requirement in detail.

> For cause to exist, the external impediment, whether it be government interference, or the factual basis for the claim, must have prevented petitioner from raising the claim. . . .
>
> The requirement of cause in the abuse-of-the-writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first petition. If what petitioner knows or could discover upon reasonable investigation supports a claim for relief in federal habeas petition, what he does not know is irrelevant.[2]

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regardless of the origin of the criminal conviction. *U.S. v. MacDonald,* 778 F. Supp. 1342, 1347 (E.D.N.C. 1991).

[2] Although *McCleskey* involved an abusive Section 2254 petition, its directives regarding abuse of the writ are equally

McCleskey 499 U.S. at 492 (cites omitted).

Moore asserts that his failure to raise his present claims previously was caused by the incompetence of his prior counsel. Where no Sixth Amendment right to counsel attaches to a proceeding, an ineffective assistance of counsel claim can not be sustained. *United States v. MacDonald,* 966 F.2d 854, 859 n. 9. (4th Cir. 1992). Convicted individuals have no right to counsel in collateral proceedings. *Pennsylvania v. Finley,* 481 U.S. 551, 555 (1987). "Therefore, attorney error in an initial habeas proceeding cannot serve as cause to review subsequent petitions." *MacDonald* 966 F.2d at 859 n. 9.

Moore relies on newly discovered evidence and an alleged intervening change in the law to establish cause and prejudice for his failure to bring his current challenge to his conviction under the Hobb's Act (Claim Three). Moore asserts that he has discovered a pleading filed by Paul Kizer in a civil suit in West Virginia that corroborates that the payments made from Kizer to Moore were for legal services, not as a bribe. However, the factual basis for a claim that Kizer and Moore had an ongoing attorney-client relationship was readily available at the time of his first Section 2255. In his initial 2255 petition Moore asserts,

> . . . Kizer had an ongoing attorney-client relationship with Moore, both before and after his

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applicable to collateral attacks on federal or state sentences. "[T]he underlying rationale of *McCleskey* was based on ensuring finality in habeas litigation regardless of the origin of the criminal conviction. *MacDonald,* 778 F.Supp. at 1357 (citing *McCleskey* at 1468).

> term as governor began and ended. Moreover, if Hundley had inquired of Kizer or his counsel, he would have found that Kizer had *denied* any such extortion, *under oath,* before a grand jury.

(emphasis in original) *Moore,* Civil No. 2:91-0797, Memorandum of Law in Support of Moore's Motion to Vacate Conviction and Sentence, p. 5. The facts supporting petitioner's current challenge to his conviction under the Hobb's Act were readily available to him at the time of filing his first petition and do not support a finding of cause excusing his default.

Moore also asserts that a new change in the law establishes cause for failure to previously raise his present challenge to his conviction on Count Two. Moore alleges at the time he pled guilty the wrongful acceptance of a bribe by a public official was all that was required to establish a violation of the Hobbs Act in the Fourth Circuit. *United States v. Paschal,* 772 F.2d 68, 72-74 (4th Cir. 1985). An individual only pleads to the essential elements of the offense listed in the indictment. Subsequent to his plea and his previous 2255, motion the Supreme Court narrowed the Fourth Circuit interpretation of the Hobb's Act by requiring the government to prove that, "a [1] public official has obtained a [2] payment to which he was not entitled, knowing that [3] the payment was made in return for official acts." *Id.* at 72. Since an "official act" was not an essential element at the time he pled, he did not plead guilty to this element and maintains that he never committed the official act and therefore is entitled to the retroactive effect of the Supreme Court's decision in *Evans v. United States,* 119 L. Ed.2d 57 (1993).

Cause may be established for failure to raise a claim if the claim was "so novel that its legal basis [was] not reasonably available" at the time of the prior petition. *Clanton v. Muncy*, 845 F.2d 1238, 1243 (4th Cir. 1988); *Reed v. Ross*, 468 U.S. 1, 16 (1984).

> A legal argument need not have succeeded elsewhere before it will be found to be reasonably available. [*Smith v. Murray*, 477 U.S. 527, ___ (1986)]. Rather, cause will be found where the "basis for the constitutional claim is available, and other defense counsel have perceived and litigated that claim." *Engle v. Isaac*, 456 U.S. 107, 133-34 (1982).

Clanton, 845 F.2d at 1242.

The legal basis for Moore's challenge to his conviction under the Hobb's Act was available at the time of his prior petition. At the time of his previous petition other Circuits required an 'official act' as an element for a conviction under the Hobb's Act. *United States v. Aguon*, 851 F.2d 1158, 1166 (9th Cir. 1988); *United States v. O'Grady*, 742 F.2d 682, 693 (2nd Cir. 1984).[3] Accordingly, Moore has failed to establish cause excusing his failure to raise his third claim in his prior petition.

Ends of Justice

Even though petitioner has failed to establish cause for failure to challenge his fines in his first petition, he

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[3] Moore cited both of these cases in his prior Section 2255 petition in support of the proposition that Hobb's Act should be strictly construed and does not apply to local officials. Civil No. 2:91-0727, A. Moore's Memorandum of Law in Support of 2255 Motion p. 51-52.

may still be entitled to habeas relief if he can demonstrate that a "fundamental miscarriage of justice" has occurred. *Id.* at 495; *Stone v. Powell,* 428 U.S. 465, 491-92, n. 31 (1976). The "miscarriage of justice" exception, sometimes referred to as the "ends of justice" exception, requires the Court to address the merits of a successive or abusive claim if the petitioner supplements his claim of constitutional error with a colorable claim of actual innocence. *Sawyer,* 120 L. Ed. 2d at 279; See *MacDonald,* 778 F. Supp. at 1356. In order to meet the actual innocence exception Moore must show,

> a fair probability that, in light of all the evidence, including any alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial, the trier of the facts would have entertained a reasonable doubt of his guilt.

Sawyer, 120 L. Ed. 2d 279 (citing *Kuhlman,* 477 U.S. at 455). Moore fails to make a colorable claim of actual innocence with regard to any of his claims.

Conclusion

Moore's second Section 2255 petition is abusive and successive. Petitioner has not established cause excusing his failure to raise his present claims in his prior petition. The ends of justice would not be met by addressing the merits of the petition because Petitioner has failed to make a colorable showing of actual innocence. Accordingly, disposition of petitioner's claims for these reasons

makes it unnecessary to address the merits of the sentences on each count specifically but the Court will address them generally.

The only sentence imposed that was in anyway irregular was the fine imposed on Count Five, the guideline count. The United States Sentencing Guidelines under Section 5E1.2(c) authorized a fine from $3,000 to $30,000 but the court imposed a fine of $50,000 without making factual findings to justify an upward departure. However, the guidelines also state that notwithstanding the limits outlined in 5E1.2(c) the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release. United States Sentencing Guidelines, Section 5E1.2(i). Such an assessment is mandated where the record reflects the defendant has the means to cover the costs. The presentence report indicates that defendant had the means to cover the costs of his incarceration. It can therefore be assumed that the $20,000 imposed above the limits of Section 5E1.2(c) was intended to cover the costs of defendant's obligation under Section 5E1.2(i).

The petition for relief pursuant to 28 U.S.C. § 2255 is denied.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to the petitioner and counsel for the respondent.

/s/ Richard C. Williams
SENIOR UNITED STATES
DISTRICT JUDGE

DATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 4, 1994

No. 94-6715
CA-93-1015
CR-90-78

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

ARCH A. MOORE, JR.

Defendant – Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

* * *

[p. 55] THE COURT: Beg your pardon?

MR. HUNDLEY: Can I make my second affidavit a part of the record?

THE COURT: Yes, I said that I would permit it to be filed.

MR. HUNDLEY: Yes, I thought.

MR. CAMPBELL: No objection, your Honor.

THE COURT: I said I would permit it to be filed, if you will just leave it with the clerk.

MR. ELLIS: Your Honor, I have a further matter. For this motion to withdraw, I would like to present the Court with the motion. An order has been signed by both parties.

THE COURT: Is that an endorsed order?

MR. ELLIS: Yes, it is.

THE COURT: Is that satisfactory, Mr. Hundley, for me to enter an order withdrawing that from the record?

MR. HUNDLEY: Yes. And I just would want to add this. Mr. Ellis made the representation to me on the phone that is was, you know, withdrawn for good, that it will not be resubmitted tomorrow or et cetera. So that is perfectly satisfactory.

THE COURT: It will be withdrawn for good as far as I am concerned. If some appellate court should call it to my attention, I have a copy and I would answer truthfully [p. 56] under oath or otherwise and produce

what was submitted to me and which you gentleman have now agreed was inadvertently filed.

MR. ELLIS: Thank you, your Honor.

(Handling to the Court.)

THE COURT: Anything else, then, gentlemen?

MR. CAMPBELL: Nothing, your Honor.

MR. HUNDLEY: Your Honor, just as a matter of procedure, what – and I am not asking for any continuance or anything like that. I had not submitted to the presentence officer any version of our events, you know, in light of the motion I had filed. I'm going to get together with him and I'm sure I can get it to him early this afternoon – well, I'll get it to him this afternoon.

THE COURT: Well, I would be glad to have anything that you wish to present, Mr. Hundley.

MR. HUNDLEY: Or if you want, I could do it orally. The reasons why I didn't submit it were for obvious reasons, you know, if your Honor granted the motion.

THE COURT: All right, could you get it to me by 9:00 o'clock tomorrow morning?

MR. HUNDLEY: Yes, sir; yes, sir. I'll get it directly to you, sir.

THE COURT: I will be here at Judge Knapp's, and get them a copy.

* * *

EXHIBIT B

IN THE DISTRICT OF COLUMBIA, to-wit:

1. I Stephen V. Wehner, am an attorney admitted to practice before the bars of West Virginia and the District of Columbia. I served as an Assistant United States Attorney in Philadelphia, PA, and have been in private practice in Washington, DC since 1986.

2. I was retained by Arch A. Moore, Jr., through my former law firm, in or about March, 1991, for the purpose of post-sentencing and related matters arising out of Mr. Moore's conviction in the Southern District of West Virginia.

3. In that capacity, I conducted an extensive review of the case. I reviewed thousands of documents, but only a few of these came from Mr. Moore's former counsel, William G. Hundley.

4. I, my then-partner Donald E. Santarelli, and Troy B. Conner, co-counsel, met with Mr. Hundley in early April, 1991. The purpose of the meeting was to determine the specifics of Mr. Hundley's representation of Mr. Moore in order to determine the remedies available to Mr. Moore. At this meeting, Mr. Hundley expressed a firm desire to cooperate fully in any and all post-conviction matters, including a recital of his own actions and advice to Mr. Moore.

5. After the early April meeting with Mr. Hundley, I drafted an affidavit for Mr. Hundley's signature setting forth matters inclusive of those which we had discussed at the early April meeting.

6. After submission to Mr. Hundley, he refused to execute the affidavit. Thereafter, cooperation with me by

Mr. Hundley ceased, and subsequently he provided affidavits to the government and became a witness for the government.

7. I pursued discovery from Mr. Hundley, to support Mr. Moore's post-conviction remedies. By Court Order, I was limited to four narrow categories of discovery which were ordered produced by Mr. Hundley.

8. Very limited material was produced by Mr. Hundley pursuant to the Court's very limited Order.

9. For purposes of this affidavit, I have been asked whether I had any knowledge whatsoever, at any time, of the submission of the contents of the Kuhn affidavit in a "Sentencing Memorandum" by the United States Attorney.

10. I was not aware of, did not see, did not receive, nor did I review any "Sentencing Memorandum", submitted by the Government in support of their position at Mr. Moore's sentencing at any time prior to April 21, 1994, when I was inquired of by Mr. Moore if I knew of its existence.

11. I was never informed by Mr. Hundley, nor any member of his firm, that a "Sentencing Memorandum" ever existed, or that a Memorandum in violation of Mr. Moore's Plea Agreement was submitted by the government at the time of sentencing.

12. Therefore, I submit to the Court that at no time, either before, during, or after my representation of Mr. Moore, prior to April 21, 1994, did I have any reason to believe, or have any knowledge whatsoever that the government had submitted the contents of their May 7th,

1990 Memorandum, the "Kuhn Affidavit" in a "Sentencing Memorandum", in its case against Mr. Moore.

Sworn to this 4th day of May, 1994.

/s/ Stephen V. Wehner
Stephen V. Wehner

Taken, sworn to and subscribed before me this ___ day of May, 1994.

_____
Notary Public

My commission expires: _____

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105.)